

protection of the species until the formal listing process is completed. In 1989, the return of winter-run chinook salmon was estimated at only 500 fish which is 75 percent below a consistent run size of 2,000 to 3,000 fish in recent years.

This emergency rule includes a designation of critical habitat in a portion of the Sacramento River from Red Bluff Diversion Dam, Tehama County (River Mile 243) to Keswick Dam, Shasta County (River Mile 302) including the adjacent riparian zones, the water in the river, and the river bottom for the winter-run. This section includes the portion of the river in which suitable conditions can be maintained for spawning, incubating eggs, and rearing juvenile fish.

EFFECTIVE DATE: Winter-run chinook salmon in the Sacramento River are listed as threatened under the ESA and critical habitat is designated effective April 2, 1990 through November 28, 1990, or until the final listing is effective, whichever ever occurs first.

FOR FURTHER INFORMATION CONTACT: James H. Lecky, NMFS, Southwest Region, Protected Species Management Branch, 300 South Ferry Street, Los Angeles, CA 90731, 213-514-6664 or Margaret Lorenz, NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910, 301-427-2322.

SUPPLEMENTARY INFORMATION:

Background

NMFS has been monitoring the status of the winter run of chinook salmon in the Sacramento River since the American Fisheries Society (AFS) petitioned NMFS to list the run in 1985. On February 17, 1987, NMFS published its determination that the listing was not warranted at that time (52 FR 6041). In response to severe environmental conditions created by drought in 1987 and 1988, NMFS reviewed its original determination to ensure that existing protective measures were providing protection for the run. On December 9, 1988 (53 FR 49722), NMFS published its determination that existing protective measures were mitigating the effects of

the drought conditions. A major element of NMFS' consideration was that the run had stabilized at about 2,000 fish after nearly two decades of decline. However, in 1989, only 550 winter-run chinook returned to the Sacramento River, an additional decline of nearly 75 percent.

In response to this new decline, NMFS decided that immediate action was needed to bring the protective measures of the ESA to bear on the restoration of the run and published an emergency rule to list the run as a threatened species (54 FR 32085). NMFS will not complete the rulemaking process to add the species to the list of endangered species before the expiration of the emergency rule. Therefore, it is publishing a new emergency rule to ensure the run continues to receive the protection of the ESA while a listing determination is being made.

The 1989 run size was dangerously low, and the 1990 run may not be much larger since it was spawned during drought conditions in 1987. NMFS estimates that a run size of between 400 and 1,000 fish is necessary to maintain genetic diversity in the winter run population (52 FR 6041). If poor returns in 1990 and 1991 follow the poor return of 1989, NMFS believes the population may begin losing genetic diversity through genetic drift and inbreeding. Also, small populations are vulnerable to major losses from random environmental events such as droughts and El Niño events. Given the anticipated small return this year and continuing dry weather conditions, NMFS believes that an emergency situation continues to exist.

Available Conservation Measures

Conservation measures provided to species that are listed as threatened under the ESA include recognition, recovery actions, implementation of certain protective measures, and designation and protection of critical habitat. One of the most useful protective measures is the section 7 consultation process which requires all Federal agencies to conduct

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 226 and 227

[Docket No. 90778-0079]

Endangered and Threatened Species; Critical Habitat; Winter-run Chinook Salmon

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Emergency interim rule.

SUMMARY: NMFS is publishing a new emergency rule to list the winter run of chinook salmon in the Sacramento River, California, as a threatened species under the Endangered Species Act (ESA) of 1973. NMFS first listed this species on an emergency basis on August 4, 1989. Since that time, NMFS has published a proposed rule to formally add the run to the list of threatened species (March 20, 1990—55 FR 10260). NMFS is publishing this new emergency listing to avoid a hiatus

conservation programs for threatened and endangered species and to consult with NMFS regarding the potential effects of their actions on species under NMFS' jurisdiction.

When the emergency rule became effective, NMFS initiated section 7 consultations with the Federal agencies whose actions affect the winter run or adversely modify or destroy its critical habitat. NMFS has initiated consultations with the Bureau of Reclamation on operation of Red Bluff Diversion Dam, the Army Corps of Engineers on gravel mining and flood control operations, and the Pacific Fisheries Management Council on the effect of sport and commercial fishing. Under the new emergency rule, NMFS will continue consulting with these and other Federal agencies to ensure the protection of the run until the formal listing process is completed.

Also, NMFS will continue its coordination with the State of California in managing this run and its habitat. The State's Endangered Species Act contains a provision for interagency consultation among State agencies similar to section 7 of the Federal ESA. The State's Department of Fish and Game will be reviewing impacts of State actions on the winter run to see if there are actions beyond the Ten-point Restoration Plan that can be taken. Also, they will be reviewing the State's water projects for opportunities to improve water conservation, and they will be reviewing their own sport and commercial fishing regulations to ensure those fisheries will not jeopardize the continued existence of the winter run.

NMFS will also participate in the State's review of sport and commercial fishing regulations. NMFS is charged with implementing the Magnuson Fisheries Conservation and Management Act (MFCMA) and publishes and administers regulations to implement fishery management plans developed by Regional Fishery Management Councils. Generally, interjurisdictional fisheries or fisheries that occur primarily in Federal waters are candidates for management under the MFCMA and this includes the fisheries for Pacific salmon. The Pacific Fishery Management Council manages salmon fisheries off the coasts of Washington, Oregon, and California. Generally, the Council strives to manage the fishery by consensus among the Federal and state fishery management agencies so that state regulations in state waters are consistent with Federal regulations in Federal waters.

Through these consultations under the respective State and Federal laws, NMFS expects a State/Federal

regulatory regime to be developed that will ensure the winter run population is not adversely affected by sport or commercial fishing. Therefore, NMFS is providing an exemption from the prohibition on taking of winter run chinook for fishermen who are fishing lawfully under State law or regulation or Federal regulations under the MFCMA.

NMFS retains its right and responsibility to exert Federal authority in State waters in the event the State develops fishing regulations that are less protective than is commensurate with the designation as a threatened species under the Federal ESA.

Critical Habitat

Section 4(a)(3)(A) of the ESA contains the requirement that critical habitat be designated concurrently with the determination that a species is an endangered species or is a threatened species. Therefore, as part of this emergency rule, NMFS is designating the portion of the Sacramento River between Red Bluff Diversion Dam, Tehama County (River Mile 243) and Keswick Dam, Shasta County (River Mile 302) including the adjacent riparian zones, the water in the river, and the river bottom as critical habitat for the winter run of chinook salmon. This portion of the river contains almost all of the habitat in which winter run can spawn successfully, if water management strategies for maintaining suitable temperatures are implemented, and habitat in which most juvenile winter run will rear.

Section 4(b)(2) requires that economic impacts of specifying an area as critical habitat be considered in the process of designating critical habitat. NMFS is designating only that portion of the river that is necessary to ensure the survival and development of spawned eggs and successful rearing of juveniles during the 240 days the emergency rule is in effect. NMFS believes this is the minimum amount of habitat that is necessary to ensure the continued existence of the species. However, after NMFS evaluates other alternatives for critical habitat designation including habitat in which winter run has spawned successfully during exceptionally good water years, it plans to initiate a rulemaking to designate critical habitat.

The economic impacts of this designation are expected to affect only the Federal agencies operating in the river, primarily the Bureau of Reclamation and the Army Corps of Engineers. The emergency rule is not expected to diminish the amount of water that can be made available for irrigation. The worst case scenario would be unusually high temperatures

and the resulting requirement that cold water be released to maintain temperatures below critical levels. This released water could be used downstream of the area designated as critical habitat for irrigation and other purposes.

Effects of Designating Critical Habitat

Federal agencies conducting, authorizing, or funding actions will incur additional administrative costs in conducting the evaluation of the effects of their actions on critical habitat. This expense will be minimal given that these agencies will be reviewing these same actions to assess their effects on the continued existence of the species.

The Bureau of Reclamation will be required to ensure that suitable water temperatures for winter run egg development and growth of juvenile fish are maintained in the portion of the critical habitat in which spawning is expected to occur. During the 1987-1988 drought, the Bureau took steps under the Cooperative Agreement to maintain suitable water temperatures between Keswick Dam and Cottonwood Creek (approximately 14 river miles above Bend Bridge). Generally, about 80 percent of the run spawns above Cottonwood Creek. The major action implemented by the Bureau was using the low level outlet for releasing water from Shasta Lake. This was done for the first time in 1987 and again in 1988. Because the low level outlet is below the outlet that runs water to the powerhouse, it releases cold deep water during periods of the year when the powerhouse outlet is draining warmer water nearer the surface. While the low level outlet releases cold water to the benefit of the winter run, the water bypasses the powerhouse and no power can be generated from the release of that water. Between July 21 and September 17, 1988, the Bureau released almost 400,000 acre-feet of water through the low level outlet at the expense of \$3.65 million in foregone power revenues. Conditions in 1989 were not as severe, but the Bureau did release water through the low level outlet at the expense of \$1.4 million.

The Bureau is expected to raise the gates in the Red Bluff Diversion Dam on December 1, 1989, and keep them raised through April 1, 1990, consistent with past performance under the Cooperative Agreement implementing the Ten-point Winter Run Restoration Plan. This will facilitate passage of juvenile fish downstream in December and provide access for adults to critical habitat. Because this activity occurs during the non-irrigation season, it is not expected

to affect agricultural operation dependent on water diverted at the Red Bluff Diversion Dam.

Since the Bureau has previously agreed to conserve winter run habitat by raising the gates at Red Bluff Diversion Dam and by maintaining suitable temperatures and because failure to conduct these actions could adversely modify critical habitat, NMFS has determined that the economic impact of these actions to the Bureau does not outweigh the benefits to be derived from implementing measures to conserve the winter run's spawning habitat during the 240 days the emergency rule is in effect.

The emergency situation brought on by the poor return of spawning adults in 1989 precludes the opportunity for completing a more detailed economic analysis. Other Federal actions such as consideration of the City of Redding's Federal Energy Commission applications are not likely to progress to the point that resources will be irreversibly or irretrievably committed during the 240 days this emergency rule is in effect. Therefore, these actions were not considered in this brief economic assessment.

A complete economic analysis of the impact of designating critical habitat will be included in the proposed rule NMFS plans to issue for designating critical habitat.

Classification

Since the Assistant Administrator for Fisheries, NOAA, has determined that the present situation poses a significant risk to the well-being of the Sacramento River winter-run chinook salmon, emergency regulations can be issued under 16 U.S.C. 1533(b)(7).

The Assistant Administrator finds that reasons justifying promulgation of this rule on an emergency basis make it impracticable and contrary to the public interest to provide notice and opportunity for prior comment or to delay for 30 days its effective date under sections 553 (b) and (d) of the Administrative Procedures Act.

This emergency rule is exempt from the normal review procedures of Executive Order 12291 as provided in section 8(a)(1) of that order. This rule is being reported to the Director of the Office of Management and Budget with an explanation of why it is not possible to follow the usual procedures of that order.

This rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act.

The Regulatory Flexibility Act does not apply to this rule because as an emergency rule, it is issued without

opportunity for prior public comment. Since notice and opportunity for comment are not required to be given under section 553 of the Administrative Procedures Act, and since no other law requires that notice and opportunity for comment be given for this rule, under sections 603(a) and 604(a) of the Regulatory Flexibility Act, no initial or final regulatory flexibility analysis has been or will be prepared.

National Environmental Policy Act

The National Oceanic and Atmospheric Administration (NOAA) has determined that certain categories of its activities do not normally have the potential for a significant effect on the human environment and are, therefore, exempt from the requirement for preparation of either an environmental assessment or an environmental impact statement (NOAA Directives Manual 02-10 5c(3)). Listing actions under section 4(a) of the ESA and designation of critical habitat are among those actions NOAA has determined are exempted (NOAA Directives Manual 02-10 5c(3)(h)). The main environmental impact from this emergency rule will be modification of water temperatures in the area designated as critical habitat for the benefit of incubating winter-run eggs and developing young. This is not expected to produce a significant impact to the human environment.

List of Subjects in 50 CFR Parts 226 and 227

Designated critical habitat and threatened fish and wildlife.

Dated: March 27, 1990.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

Accordingly, parts 226 and 227 of chapter II of title 50 of the Code of Federal Regulations are amended as follows.

PART 226—[AMENDED]

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

Subpart C—Critical Habitat for Marine and Anadromous Fish

2. The title of subpart C under part 226 is revised to read as set forth above.

3. Section 226.21 under subpart C is added to read as follows:

§ 226.21 Sacramento River California winter-run chinook salmon (*Oncorhynchus tshawytscha*).

The Sacramento River between Red Bluff Diversion Dam, Tehama County (River Mile 243) and Keswick Dam,

Shasta County (River Mile 302) including the adjacent riparian zone, the water, and the river bottom.

PART 227—[AMENDED]

1. The authority citation for part 227 continues to read as follows:

Authority: 16 U.S.C. 1531 et seq.

2. Section 227.4 under subpart A is amended by revising paragraph (e) from April 2, 1990 through November 28, 1990, to read as follows:

§ 227.4 Enumeration of threatened species.

(e) Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*).

3. The title of subpart C under part 227 is amended April 2, 1990 through November 28, 1990, to read as follows:

Subpart C—Threatened Marine and Anadromous Fish

4. Section 227.21 of subpart C is revised April 2, 1990 through November 28, 1990, to read as follows:

§ 227.21 The Sacramento River winter-run chinook salmon.

(a) *Prohibitions.* The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to the Sacramento River winter-run chinook salmon for the 240-day period the emergency rule is in effect.

(b) *Exceptions.* (1) The exceptions under section 10 of the Act (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species and exceptions relating to endangered species under the regulations, such as the provisions of part 222, subpart C—Endangered Fish or Wildlife Permits, also apply to the Sacramento River winter-run chinook salmon for the 240-day period the emergency rule is in effect.

(2) Any acts involving winter-run chinook salmon which were taken lawfully under a State of California fishing law or regulation, or which were taken lawfully under a fishing regulation under the Magnuson Fisheries Conservation and Management Act. There shall be a rebuttable presumption that the winter-run chinook salmon involved in any acts are not entitled to the exemption contained in this subsection.

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